

**RESOLUTION OF TELECOMMUNICATIONS  
ACCESS DISPUTES**

**RESPONSE OF**

**FOXTEL MANAGEMENT PTY LIMITED**

**26 JUNE 2002**

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## Key Messages

- FOXTEL welcomes the opportunity to participate in the development of the Commission's guide for resolution of access disputes in the Australian telecommunications industry.
- The timely resolution of telecommunications access disputes continues to be of fundamental importance to the development of competition in Australian telecommunications markets.
- Current processes for determining telecommunications access disputes are cumbersome, resource-intensive and slow.
- FOXTEL supports the Commission's attempts to streamline and improve the administration and management of the Part XIC arbitration process.
- FOXTEL considers that the independent consultants' report and the draft guide contain many useful reform initiatives.
- FOXTEL strongly supports the establishment of a case management process for arbitrations.
- FOXTEL also supports the Commission's proposal to make greater use of alternative dispute resolution processes.
- FOXTEL suggests that the Commission should focus on defining the issues in dispute in an arbitration at an early stage and on the process of obtaining the information necessary for resolving those issues.

## 1 Introduction

FOXTEL is pleased to provide its response to the Australian Competition & Consumer Commission's ("**Commission**") draft guide to the Resolution of Telecommunications Access Disputes ("**Draft Guide**").

FOXTEL supports the Commission's current attempts to streamline and improve arbitration procedures.

The Draft Guide is a very positive first step in the process of achieving a more effective and efficient regime for telecommunications access arbitrations.

FOXTEL notes the important contribution made by the Phillips Fox *Review of Telecommunications Arbitration Process* ("**Phillips Fox Review**") dated 18 April 2002. The report of the Phillips Fox Review contains many useful recommendations for the improvement of the current arbitration processes.

FOXTEL believes that the development and implementation of the Draft Guide will greatly benefit the telecommunications industry and other industries affected by Part XIC including the subscription television broadcasting industry.

In particular, FOXTEL supports the establishment of a case management process to progress telecommunications arbitrations in an efficient and timely manner, the introduction of guidelines to govern the use and reporting of experts, and the recognition of the benefits of written submissions in complex disputes.

Whilst supporting the key proposals contained in the Draft Guide, FOXTEL has made a number of comments and suggestions in this submission in relation to the following issues:

- the need for the Commission to recognise the desirability of disputes being settled commercially, and the need for incentives to encourage commercial negotiations. FOXTEL submits that the Draft Guide should place more emphasis on the fact that arbitration should only be used as a last resort if commercial solutions cannot be found.
- the case management process. In particular, FOXTEL submits there is a need for the Draft Guide to set out procedures to better manage and track timetables (including time limits on Commission decisions) in order to ensure the fast and effective resolution of disputes;
- the desirability of guidelines for assessing relevance of documents;
- the desirability of guidelines in relation to the disclosure of confidential information.

FOXTEL expands on these issues below.

## **2 Commencement of arbitration**

### **2.1 Principles underlying Part XIC**

FOXTEL submits that formal arbitration under Part XIC should be regarded as a last resort. That was the clear intention of the Parliament as evidenced in the Explanatory Memorandum, which states that:

Accordingly FOXTEL submits that the Draft Guide should emphasise the primacy of commercial negotiations as a means of resolving access disputes.

FOXTEL is also concerned that the Draft Guide places such strong emphasis on the fact that many telecommunications disputes are characterised by a mutual lack of incentive to commercially agree. For example, the Draft Guide states:

“Telecommunications arbitrations concerning declared services are often characterised by a lack of mutual commercial incentive to reach settlement, particularly where the service is provided by means of infrastructure with natural monopoly characteristics and the access provider competes in downstream markets”.<sup>1</sup>

FOXTEL submits that difficulty and complexity should not be equated with lack of incentive.

Access providers frequently have some incentive to resolve disputes commercially. FOXTEL notes that the vast majority of Part XIC arbitrations have been settled commercially before a final determination was issued by the Commission. Whilst in many cases, particularly in the early Part XIC arbitrations, matters may have settled because the parties "saw the writing on the wall" in relation to the decision the Commission was likely to make, that is not an adequate explanation of the outcome of some of the more recent arbitrations. There now seems to be a more complex mix of commercial and regulatory incentives to settle early wherever possible rather than engage in formal arbitration.

Nevertheless, there are clearly many cases where the parties' positions are so far apart that commercial negotiation alone is unlikely to achieve an outcome consistent with the objects of Part XIC. Accordingly FOXTEL agrees that, as emphasised in the Draft Guide, there are many advantages in the use of ADR procedures, to assist commercial negotiations or as an adjunct to Part XIC arbitration procedures. FOXTEL supports the use of properly designed and managed ADR processes where appropriate.

## **2.2 Dispute notification and jurisdictional issues**

The Draft Guide states that:

“the Commission does not consider the "unable to agree" threshold should be interpreted as a particularly high threshold. For example, the Commission considers that the existence of a contract in and of itself does not necessarily preclude a party from notifying an arbitration”.<sup>2</sup>

FOXTEL submits that whilst the "unable to agree" threshold is low, the Commission would not have power to invoke its jurisdiction where there is an agreement between the parties that deals with all necessary aspects of the supply of a declared service.

The Commission's proposed approach would be particularly onerous in circumstances where the Commission proposes to invoke its jurisdiction where there are no questions of enforceability of a contract, and a dispute arises merely because one party wishes to vary a binding agreement and the other party refuses to do so.

## **2.3 Contractual arrangements for dispute resolution.**

FOXTEL submits that the Commission must respect agreed dispute resolution processes.

Under the Act, the Commission may only commence an arbitration where the parties are “unable to agree”. A relevant consideration as to whether a dispute exists is whether or not the dispute processes set out in any relevant contract have been adhered to. If the parties have contractually agreed to undertake certain dispute resolution processes before notifying a dispute, the Commission should not commence an arbitration until the parties have completed the agreed processes, because until agreed processes are completed the parties cannot be said to be “unable to agree”.

FOXTEL notes the Commission's view that contractual arrangements requiring dispute resolution processes to be completed before a dispute can be notified are unenforceable. FOXTEL would appreciate further information in relation to the Commission's reasons for its view, so that this very complex and important issue may be explored more carefully.

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<sup>2</sup> Draft Guidelines, paragraph 2.2.

### **3 Arbitration processes**

#### **3.1 The role of Commission staff in the arbitration process**

The Draft Guide states that Commission staff may perform a conciliation or mediation role in relation to particular issues which are the subject of an arbitration.

FOXTEL submits that in order to avoid confusion about roles and responsibilities, in general Commission staff ought not to perform the roles of mediator or conciliator.

Apart from the confusion which arises from Commission staff wearing different hats at different times, there may be some reluctance for a party to take part in a full and frank discussion in the presence of Commission staff who are subsequently involved in an arbitration process in relation to the same subject matter.

FOXTEL acknowledges that there will sometimes be circumstances where it may be useful to have a Commission staff member present during a conciliation or mediation. Commission staff are often the only people with enough knowledge of a dispute to be able to provide direction to an ADR process.

FOXTEL suggests that if those circumstances arise and Commission staff participate in a mediation or conciliation, then the particular staff member or members should generally be excluded from any further work on that arbitration.

#### **3.2 Public statements made by the Commission**

To avoid perceptions of bias or prejudice, FOXTEL submits that the Commission should not make public statements in relation to issues in dispute before it.

FOXTEL is concerned that the Draft Guide does not presently address recommendation 3 from the Phillips Fox Review regarding the making of public statements.

The Phillips Fox Review noted concerns expressed about the Commission's neutrality. FOXTEL requests that the Draft Guide be amended to adopt the recommendation of the independent consultants that:

“The risk of any perception of pre-judgment can be minimised by ensuring that the Commission does not make public comments in relation to issues which are in dispute, or if it does, that the comments are clearly distinguished as the views of an individual and not the Commissioners involved in arbitrating a dispute.”

## **4 The case management process**

### **4.1 Monitoring the case management process**

FOXTEL reiterates its strong support for the proposal to use case management procedures, and case management teams, to provide “strategic focus”. FOXTEL is optimistic that such procedures will be beneficial in minimising delay, a very significant problem in arbitrations to date.

FOXTEL believes that in order for the case management process to work, it is critical that the Commission itself be bound by agreed timetables.

In addition, FOXTEL supports the recommendation made by the Phillips Fox Review (R48) that a uniform tracking system be implemented to monitor the events in an arbitration, including directions, consent orders and ADR processes, the extent of compliance with directions and other events which may affect the progress of the arbitration. It is sometimes unavoidable that initial timetables are not able to be adhered to, due to disputes arising during the course of the negotiations (for example, disputes about the relevance of documents) or issues becoming more complex than originally thought. It is imperative that if this happens the Commission ensures that the arbitration process does not break down but that it is brought back on track quickly with new timetables and directions.



## **5 Submissions during the course of an arbitration and use of oral hearings**

### **5.1 The use of written submissions**

The Draft Guide confirms the Commission's previously expressed view of the appropriateness of the use of written submissions in telecommunications arbitrations. FOXTEL shares this view. FOXTEL considers that the use of written submissions should continue to be the primary means by which the Commission receives submissions from the parties, but that oral submissions are also necessary in most cases in order to clarify written submissions, particularly in relation to technical issues.

The Commission has raised a concern that there is a tendency for submissions to delay an arbitration if they are voluminous or argumentative. FOXTEL acknowledges that there is potential for verbose or argumentative submissions to impede rather than assist the Commission's deliberations. Long written submissions can be particularly confusing when they include a mixture of fact and opinions on matters outside the area of expertise of the author, for example, complex technical explanations written by lawyers or economists.

### **5.2 FOXTEL agrees that there is scope for the introduction of "defined length" written submissions in some cases. Limits to submissions should be agreed between the parties at case management meetings at a time when the issues in the dispute have been properly defined. The use of oral submissions**

Whilst FOXTEL considers that written submissions are generally preferable as the primary source to inform the Commission of the parties' views, there is still a role for oral hearings to clarify written submissions and test credibility, and indeed in some cases a greater use of oral submissions may clarify the issues in dispute.

Hearings before Commissioners should rarely be used to resolve issues of factual dispute, or as the principal means of outlining the views of the parties to the Commission. FOXTEL is concerned that the over-use of hearings, or the replacement of written submissions by hearings generally, might lead to an excessively legalistic process in a courtroom atmosphere, with the potential for delay in resolution of the arbitration.

## **6 Experts and experts' reports**

### **6.1 Use of experts appointed by the Commission**

The Commission has expressed the view that in order to better understand particular issues, or to analyse factual material, it may be useful for it or the parties to engage an expert. FOXTEL supports the use by the Commission of appropriately qualified experts to assist the Commission in this way. FOXTEL notes, however, that a number of important recommendations contained in the Phillips Fox Consultant's Report as to the manner of engagement of experts and, in particular, as to the development of guidelines to address the use of experts, have not been adopted by the Draft Guide.

The Phillips Fox Report contains recommendations that guidelines be developed to address the use of experts and expert reports more generally and in order that each party may ensure that the expert has all the information that the party thinks is relevant. The Commission's Draft Guide, as currently framed, does not adopt these recommendations. The Draft Guide simply states:

“...the Commission may refer any matter to an expert and receive the expert's report as evidence...When considering referring a matter to an expert, the Commission will generally seek comments from the parties before making the referral”: paragraph 4.2.2.

FOXTEL requests that the Commission consider amending the Draft Guide to give effect to the consultants' recommendations.

### **6.2 Experts' conferences**

FOXTEL supports the proposed use of expert conferences for discussion of relevant issues and as a means of attempting to limit or define issues of disagreement.

## **7 Disclosure and confidentiality**

### **7.1 Confidentiality between the parties**

The Commission has proposed the continuation of its existing practice of issuing confidentiality directions so that the parties are not to use or disclose confidential information except in the course of the arbitration. FOXTEL agrees with the Commission's proposal to continue this practice.

However, FOXTEL has some concerns with the way in which the Commission has proposed to deal with claims for confidentiality in section 6.3.1 of the Draft Guide. FOXTEL accepts that the Commission must balance the extent to which disclosure is likely to harm the legitimate commercial interests of the information provider and the extent to which non-disclosure is likely to harm the party who does not have access to that information or will hinder the ability of the Commission to perform its functions.

FOXTEL does not agree, however, that the onus of establishing that disclosure of the confidential documents will cause harm should be on the information provider. Where the access seeker and access provider are competitors, the disclosure of confidential commercial information may seriously harm the information provider. FOXTEL submits that in these circumstances, if the Commission has accepted that particular information is confidential, disclosure should be limited to external legal advisers unless the party seeking access to the documents can establish a particular need for broader access. This would sufficiently protect the interests of both parties. FOXTEL also disagrees with the generalisation that past or out of date information will usually not be likely to cause harm. Old information, even out of date information, may be extremely useful to a competitor for purposes other than the arbitration and its disclosure may harm the provider of the information. FOXTEL does not agree with the Commission that in general disclosure would not be likely to cause harm in circumstances where it merely improves the state of knowledge of the party from whom it is to be withheld.

FOXTEL recognises that these issues will differ depending on the subject matter of the arbitration and the nature of the business of the access seeker and access provider. However, FOXTEL is concerned with the broad comments made on those issues by the Commission in the Draft Guide and suggests that issues of confidentiality are more appropriate to be determined on a case by case basis.

FOXTEL is also extremely concerned at the extent to which regulatory gaming has in the past permeated the process of disclosure of commercially sensitive documents notwithstanding the apparent legislative safeguards. The Phillips Fox Review also recognises the problems that may be associated with having information available more easily in a dispute (than would be available commercially) which may encourage parties to 'game' the arbitration process to obtain commercially sensitive information that they would not otherwise be able to get.

The Phillips Fox Review indicates that it is important that there is a consistency in how information is treated and recommends that the issue of access to information in a dispute should be dealt with in a way that is consistent with ACCC policy on the level of information that is to be available to industry (R17). FOXTEL supports this recommendation.

## **7.2 Disclosure of documents**

In FOXTEL's submission, this is the key area in which the arbitration process should be improved. FOXTEL believes there have been instances where voluminous documents of marginal or no relevance have been sought by the Commission or another party. As the Commission has pointed out in other contexts, the submission of voluminous documentation for review by the Commission has the potential to delay resolution of arbitrations, and this applies with equal or arguably greater force to documentary material other than submissions.

FOXTEL recognises that the Commission must balance its obligations under section 152DB(1) to act as speedily as a proper consideration allows, having regard to the need to carefully and quickly inquire into and investigate the dispute and all matters affecting the merits, and fair settlement of the dispute.

However, FOXTEL suggests that disclosure could be minimised if the Commission were to define the issues at an early stage of an arbitration and carefully craft directions so that only relevant information is required to be disclosed. Currently the threshold for deciding whether a document is relevant seems to be that one party suggests it is relevant. Such claims need to be scrutinised more closely, and decisions might sometimes need to be made about whether there is an easier way of obtaining the relevant information.

This view is supported by the Phillips Fox Review which states that:

"[t]he consultants consider that the ACCC's generally consensual approach to dealing with the information has led to delay. The interviews undertaken also indicated that the parties to disputes have an expectation that the ACCC will perform a more traditional adjudicative role, which is seen as involving definition of the issues in dispute and the proactive control of the process for resolving those issues" (par 7.4).

Phillips Fox indicates that the Act provides the Commission with the power to take a more proactive approach in the process of producing documents and recommends that the Commission properly define the matters in dispute and then ascertain whether a document is relevant by asking itself whether the information is needed by it to perform its arbitration function. The Phillips Fox Review also recommends that guidelines be developed to set out the matters for the arbitrator to consider in directing the production and exchange of information (R13-16). FOXTEL supports these recommendations.

Whilst the Commission is not bound by rules of evidence, it is necessary for the Commission to adopt a test of relevance for disclosure purposes, which would limit the volume of material required to be considered. Otherwise there is a likelihood that Part XIC disclosure obligations could be more onerous than, for example, discovery obligations in Part IV cases. This would clearly be inconsistent with the legislative intention regarding a fast track, relatively informal industry-specific access regime.

FOXTEL suggests that having regard to the complexity and importance of these issues, the Commission should publish a separate guideline for industry discussion in relation to the appropriate relevance test for disclosure purposes and as to the use of confidential information in arbitrations.